Supreme Court, U.S.
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No. 08-1389

In the Supreme Court of the United States

John Prelesnik,
Petitioner,

v.

Chamar Avery,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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PETITIONER'S REPLY BRIEF

This case is jurisprudentially significant because it represents part of a continuing pattern by the Sixth Circuit of deciding important federal questions in a way that conflicts with relevant decisions of this Court. The same error is present here as is present in *Smith v. Spisak*, where this Court granted certiorari on the issue of whether the Sixth Circuit failed to properly apply the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[1] This Court should grant certiorari ensure that the Sixth Circuit properly applies the AEDPA standard.

It is axiomatic that a federal appellate court must give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses."[2] This "due regard" is strengthened on habeas review because of the "double layer" of deference given to State court determinations of credibility. First, under the general *Strickland* layer, a State prisoner must establish a *prejudicial* error – i.e., an error so serious that it calls into question the reliability of the entire trial.[3] Second, under AEDPA, a federal appellate court must presume that factual determinations are correct, especially those regarding witness credibility.[4]

The presumption of factual correctness can only be overcome if they are proven to be incorrect by clear and convincing evidence.[5] This Court has held that where, as

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[1] See, e.g., *Smith v. Spisak*, case no 08-724, cert granted Feb. 23, 2009.

[2] *Amadeo v. Zant*, 486 U.S. 214, 223 (1988).

[3] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[4] See, e.g., *Shabazz v. Artuz*, 336 F.3d 154, 161 (2d Cir. 2003).

[5] 28 U.S.C. § 2254(e)(1).

here, the central issue is one of credibility, an evidentiary hearing will often be necessary to resolve material factual conflicts.[6] In other words, an evidentiary hearing is generally necessary to provide the "clear and convincing evidence" required for a federal habeas court to reject the factual finding of a State trial court.

But in this case, the Sixth Circuit did not order an evidentiary hearing to determine whether the "alibi" witnesses cited by Respondent were as incredible as the State trial court who observed their testimony found them to be. Nor did the Sixth Circuit find that this was one of the "rare instances" where credibility might be determined without an evidentiary hearing, "based on documentary testimony and evidence on the record."[7] Instead, the Sixth Circuit *ignored* the finding of fact by the State trial court and it held that as a matter of law, the failure to pursue any alibi defense is per se unreasonable because it deprives Respondent of a "reasonable shot of acquittal."

I. The State court's finding of fact that the proposed alibi witnesses were not credible is presumed to be correct under AEDPA. Respondent failed to overcome that presumption.

Under the highly deferential AEDPA standard, a federal habeas court must give the State-court decision "the benefit of the doubt."[8] That "benefit of the doubt"

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[6] *Blackledge v. Allison*, 431 U.S. 63, 82 n 25 (1977).

[7] *Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir. 1990).

[8] *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam).

lasts until the habeas petitioner demonstrates that such findings are incorrect by clear and convincing evidence.[9]

Respondent argues that the finding by the State trial court that the alibi witnesses lacked credibility was completely unsupported. But Respondent, like the Sixth Circuit, failed to give the State trial court the deference that is required under AEPDA.

Here, the trial court found as a matter of fact that neither of the alibi witnesses proposed by Respondent was credible. Since their testimony could not be believed, trial counsel was not ineffective for failing to call them. Specifically, the trial court noted that purported alibi witness Damar Crimes's statement was inconsistent with Avery's testimony on a fundamental point. Pet. App. 41a. Damar Crimes testified that Avery dropped off his automobile at the repair shop on the day of the murder, while Avery claimed to have dropped the automobile off on the day before the murder. Pet. App. 40a - 41a. The trial court concluded that witness Darius Boyd – who was allegedly with Avery and Damar Crimes – was completely incredible. Specifically, the court noted that his testimony "suggests to me a manufacturing of testimony." Pet. App. 46 a.

Implicit in the State trial court's conclusion is that Avery could not have suffered prejudice from trial counsel's failure to call the "alibi" witnesses, because no reasonable juror could believe their manufactured story. In other words, the failure to call wholly non-credible witnesses cannot deprive a defendant of a fair trial because their false testimony could not with any reasonable probability have changed the outcome.

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[9] 28 U.S.C. § 2254(e)(1).

Under AEDPA, then, the federal habeas court was bound to presume that these credibility determinations were correct.

II. The Sixth Circuit did not overcome the presumption of correctness by clear and convincing evidence. Instead, it ignored that factual finding.

Respondent argues that the Petitioner is asking this Court to create a new rule making a trial court's subjective finding on witness credibility unreviewable. While that is not correct, it nevertheless highlights the idea that Congress intended habeas review of State court convictions to be a *limited* remedy. Under 28 U.S.C. § 2254(e)(2), Congress set forth very limited conditions under which a federal habeas court can proceed with an evidentiary hearing in order to make its own findings of fact. Unless those conditions are met, a habeas petitioner is *not* entitled to hearing and the findings of fact made at the State court level *must* be given deference.

Where no evidentiary hearing is authorized, the federal habeas court in rare circumstances might still review a State court determination of credibility where it is possible to conclusively decide the credibility question "based on documentary testimony and evidence on the record."[10] But the federal habeas court must have *some* basis upon which it decides there is "clear and convincing evidence" to overcome the presumption that the State trial court was correct. In the absence of either a circumstance justifying an evidentiary hearing or of "evidence on the record" disputing the State trial court's finding of fact, then a claim regarding those facts is

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[10] *McCormick*, 914 F.2d at 1170.

essentially unreviewable. That is what Congress intended when it limited the scope of habeas review under AEDPA.

Yet, the Sixth Circuit did not order an evidentiary hearing to challenge the State trial court's finding that the alibi witnesses were incredible. Nor did the Sixth Circuit undertake an analysis of the "evidence on the record" to demonstrate why the State trial court's determination of credibility was incorrect. Rather, the Sixth Circuit simply rejected the trial court's factual determination and substituted its own determination of the facts:

> We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is "exactly the task to be performed by a rational jury[,]" not by a reviewing court. Here, although the factors the state judge highlighted in her credibility assessment -- including Boyd's ability to remember exact times while failing to recall the date or day of the week that Avery visited his home -- may have ultimately affected the credibility of his testimony in the eyes of the jury, but they do not dispose of the issue of prejudice. Notably, the evidentiary hearing occurred approximately a year and three months after Avery's trial, and the record before us does not demonstrate that the presiding judge found fault with Crimes's testimony. Ultimately, as the district court properly recognized, "[O]ur Constitution leaves it to the jury, not the judge, to evaluate the

> credibility of witnesses in deciding a criminal defendant's guilt or innocence."[11]

This was the new rule created by the Sixth Circuit in this case – a rule that would deprive a State trial court from determining whether a proposed alibi witness was so incredible that his or her testimony could not have altered the outcome of the trial.[12]

According to this novel rule, any determination of a witnesses's credibility is *always* within the providence of the jury. Therefore, the failure to call a witness is *always* prejudicial, because it deprives a defendant of a "reasonable shot of acquittal."

However, this is the exact opposite of what *Strickland* requires. Under *Strickland*, a habeas petitioner carries the burden of proof to demonstrate that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [13] But that was not the holding of the Sixth Circuit in this case. Rather, the Sixth Circuit identified the "error" as failing to investigate two incredible witnesses; and it defined the "harm" caused by that error as depriving Respondent of a "reasonable shot of acquittal."[14]

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[11] *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008).

[12] Respondent's contention that the African-American State court judge in this case made her determination "based on a blatant, racist and ageist stereotype that a young black man would not have the money to pay for his car repairs without robbing someone" is hyperbole and unsupported by *any* evidence whatsoever.

[13] *Strickland*, 466 U.S. at 698.

[14] *Avery*, 548 F.3d at 439.

But this case is not an isolated instance of the Sixth Circuit deciding an important question of federal law in a way that conflicts with decisions of this Court.[15] Indeed, this case is not even the only instance where the Sixth Circuit has imposed a *Cronic* standard on habeas review without citing to *United States v. Cronic*.[16]

This Court recently granted certiorari to the Sixth Circuit in *Smith v. Spisak*, and identified one of the issues for briefing as whether "the Sixth Circuit exceeded its authority under AEDPA when it applied *United States v. Cronic* [], to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements"). In *Smith*, the Sixth Circuit undertook its analysis by noting that trial counsel was ineffective based on his arguments at closing. But the Sixth Circuit determined that the comments were the functional equivalent of counsel not being present at all and, on the basis, found that the defendant was *per se* prejudiced by those arguments. Just as in the instant case, the Sixth Circuit cited *Strickland* and purported to apply that case. Moreover, like the instant case, the Sixth Circuit did not even cite *Cronic* in its analysis. But the Sixth Circuit's decision not to cite *Cronic* is not dispositive – in both cases the Sixth Circuit held that trial counsel's failures were *per se* prejudicial and granted habeas relief on that basis.

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[15] The State of Michigan notes that it has filed three other petitions for certiorari contemporaneously with this petition. See *Berghuis v. Thompkins*, (08-1470); *Metrish v. Newman*, (08-1401); and *Berghuis v. Smith*, (08-1402). All four are murder cases, all published, all reaching disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA.

[16] *United States v Cronic*, 466 U.S. 648, 659 (1984).

Here, the Sixth Circuit did not demonstrate that, but for trial counsel's deficient performance, there was a "reasonable probability" that the outcome of the trial would have been different. Rather, the Sixth Circuit merely opined that the alibi witnesses "could have" supplied reasonable doubt and the failure to call them deprived Respondent of a "reasonable shot at acquittal." In other words, the Sixth Circuit articulated a *Cronic* standard for the failure to call an alibi witness; even though the Sixth Circuit did not cite *Cronic*.

Respectfully submitted

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assistance of counsel claim, and the Eighth Circuit reversed, holding that the proper standard was set forth in *Strickland*. It is unclear why Petitioner cites *Freeman* because the Sixth Circuit in the instant case properly applied the *Strickland* two-pronged analysis (see Issue I and III) and did not even mention *Cronic*.

The analysis and findings of the Sixth Circuit in the instant case are completely consistent with other Circuit Courts. For example, the Seventh Circuit Court of Appeals granted a petition for writ of habeas corpus in a case very similar to the one at bar. In *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007), cert denied, 128 S.Ct. 613, 169 L.Ed.2d 415 (2007), the petitioner had argued in state court that trial counsel was ineffective in failing to investigate alibi witnesses before trial, and the witnesses testified at a post-conviction hearing. The prosecutor presented evidence that the alibi testimony may have been "scripted." The state court[9] denied the motion for new trial and the state appellate courts affirmed. The federal district court denied the petition for writ of habeas corpus. The Seventh Circuit found that trial counsel was ineffective for failing to present the alibi, and further found prejudice, despite the state trial court's finding that the result of the proceeding would not have been different:

> "Raygoza is not entitled to relief, however, unless he also can establish that he was prejudiced by his attorney's deficient performance. . . . We find this test [*Strickland's* prejudice test] met as well, *even taking into account both the AEDPA standard of review and the fact that the trial judge subjectively believed that the array of additional alibi witnesses would not have swayed his judgment.*" *Id.* at 965.

The Seventh Circuit recognized that the trial judge's subjective opinion concerning the credibility and/or persuasiveness of the witnesses' testimony was not the *sole* factor in making the requisite prejudice finding.

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[9] Like the judge in the instant case, in *Raygoza* "The trial judge held a hearing on the motion, but even before the hearing began he expressed skepticism about the value of the proceeding."

> "The State's case against Raygoza was not particularly strong. The only evidence apart from the suppressed confession linking him to the crime was eyewitness identification from rival gang members . . .. and a passerby . . . On the other side, Raygoza's alibi witnesses included both family members and unrelated people; their stories were corroborated by telephone records and train tickets. Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never had the chance to do so. *This undermines our confidence in the outcome of the proceedings so seriously that we conclude that there is a reasonable probability that the result would have been different* had Raygoza's attorney presented the testimony of all or most of his alibi witnesses." *Id.*

The Sixth Circuit's application of *Strickland* in the case at bar does not conflict with that of the Seventh Circuit, or any other circuit. Moreover, *Raygoza* demonstrates that the government's position in the instant case - that a state trial judge's determination of witness credibility is unreviewable - is contrary to the prejudice standard required by *Strickland*. The trial court's subjective opinion of witness credibility is only one factor in the prejudice analysis, which is fully reviewable. *See also Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000), where the Seventh Circuit Court of Appeals rejected the state court's finding that the petitioner was not prejudiced by his attorney's alleged ineffectiveness because, if the missing defense witness had testified, the State would have put another witness on the stand to contradict the defense witness's testimony and because the other defense witnesses would have been cumulative. Under the Petitioner's Prelesnik's "new rule" in the instant case, the state court findings in *Smith* would have been unreviewable.

The analysis in the instant case is also very similar to that of the Fourth Circuit in *Griffin v. Warden, Maryland Correctional Adjustment Center*, *supra*. There, the state court found that trial counsel's failure to present alibi witnesses at trial, where the petitioner was identified by an eyewitness, was not ineffective and that the petitioner failed to demonstrate prejudice. As in the

instant case, the Fourth Circuit faulted the state court for its failure to adequately assess prejudice, and granted the petition for writ of habeas corpus. The Court found that the petitioner had shown prejudice, stating, "Eyewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man for forty years. Moreover, it is precisely the sort of evidence that an alibi defense refutes best." *Id.* at 1359.

Suffice it to say that there is *no conflict* between the decision in the instant case and those of other federal circuits regarding the standard to apply when reviewing a claim of ineffective assistance of counsel and prejudice to the defendant. That the results of the various cases are different is only a function of the specific facts of each case. It appears that Petitioner is merely dissatisfied with the result in this case.

Finally, there is absolutely no connection between the decision in the present case and the other Sixth Circuit opinions referred to by Petitioner. *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008) involves a violation of *Miranda*; *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008), involves an insufficiency of evidence issue; *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), involves a jury selection (fair cross section) issue for an automated selection process that is no longer employed by the trial court in that county.

The Sixth Circuit correctly applied Supreme Court precedent and there are no grounds for granting the Petition.

CONCLUSION

The Sixth Circuit's opinion is completely compatible with the principles set forth in *Strickland v Washington, supra*; the Sixth Circuit did not create a new rule but followed the rule of *Strickland*; the Sixth Circuit's opinion is not in conflict with decisions of the Fourth, Eighth, or Eleventh Circuits; the Sixth Circuit followed the clearly established Supreme Court precedent of *Strickland v Washington*.

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: July 2, 2009

NO. 08-1389

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PRELESNIK, WARDEN

Petitioner,

v.

CHAMAR AVERY,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)

Jacqueline Ouvry, being first sworn, says that on July 2, 2009, she filed with this Court the following:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
PROOF OF SERVICE

and she mailed one copy of same to:

Attorney General
Criminal Appellate Division
525 West Ottawa
P O Box 30217
Lansing, MI 48909

Jacqueline Ouvry
Jacqueline Ouvry

Subscribed and sworn to before me
July 2, 2009.
Joanne M. Moritz
Joanne M. Moritz
Notary Public, Wayne County, Michigan
My commission expires: 9-2-2012

- 2009